No. 18,904

United States Court of Appeals

For the Ninth Circuit

MARINE MIDLAND TRUST COMPANY, etc., et al., *Appellants,*

vs.

CITY OF NORTH SACRAMENTO, etc., *Appellee.*

CITY OF NORTH SACRAMENTO, a municipal corporation, *Appellant,*

vs.

MARINE MIDLAND TRUST COMPANY, etc., et al., *Appellees.*

On Appeal from the United States District Court for the Northern District of California, Northern Division

REPLY BRIEF OF APPELLANT CITY OF NORTH SACRAMENTO

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REPLY BRIEF OF APPELLANT CITY OF NORTH SACRAMENTO

INTRODUCTION

This is the Reply Brief of Appellant City of North Sacramento ("City") on its appeal relative to its counterclaim and costs, and is in response to the "An-

swering Brief of Marine Midland Trust Company, et al., responding to Cross Appeal of City of North Sacramento," dated January 15, 1964 (hereinafter referred to as "Answering Brief"). The headings "Point I" and "Point II" refer to the points under those headings in the Answering Brief.

POINT I

A. THE CITY'S COUNTERCLAIM HAD MATURED.

City agrees that a counterclaim must have matured before it can be filed under Rule 13(e), but the City's had matured in this instance. The District Court entered its Judgment of Dismissal on April 26, 1963 (Tr. 57), and the City did not seek to file its counterclaim until after that, on May 6, 1963. (Tr. 58.) In the cases cited by plaintiffs, the party sought to file a counterclaim arising out of the bringing of the main action, while the main action was *still pending.* In *Goodyear Tire v. Marbon,* 32 F.Supp. 279, defendant attempted to file a counterclaim for damages resulting from the Court's granting a preliminary injunction, while the action in which the injunction was issued was still pending. The counterclaimant's right to relief was unquestionably "dependent upon plaintiff's failure to prevail in the case at bar." (32 F.Supp., at 280.) In *Merz v. Merz White Way Tours,* 166 F.Supp. 601, defendant filed the counterclaim with his answer, for malicious abuse of process in bringing the action. The District Court dismissed the counterclaim because "the essential element of

such a cause of action is that the initial suit giving rise to the cause of action must have terminated in favor of the counterclaimant" (166 F.Supp. 601), and that had not yet occurred.

Similarly, in *Cyclotherm Corp. v. Miller,* 11 F.R.D. 88, "(t)he counterclaim asserted by the defendant (was) dependent upon his failure to prevail in the still pending suit in the State Court," and in *Bach v. Quigan,* 5 F.R.D. 34, the counterclaim was based on malicious abuse of process for bringing the still pending principal action.

In this case, the District Court had entered the judgment dismissing plaintiffs' action before the City made its motion to file the counterclaim.

Plaintiffs next argue that in order for C.C.P. 526(b) to apply, their action must have been defeated on the merits, whereas all the District Court decided in this case was that they brought their action in the wrong forum.

We have read and re-read Section 526(b), but are unable to find where it says that the action must be defeated "on the merits." The statute plainly says that if the injunction is finally denied, the City has its right of action. It does not deal with the basis for the denial, and therefore a denial upon any basis or for any reason must be deemed to make the statute operative.

> "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained

> therein, not to insert what has been omitted, or to omit what has been inserted;" C.C.P. 1858.
>
> "In construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language. The court is limited to the intention expressed." *Vallerga v. Dept. Alcoholic Bev. Control* (1959), 53 C.2d 313, at 318.
>
> "The general rule is that a court is not authorized in the construction of a statute, to create exceptions not specifically made. If the statute announces a general rule and makes no exception thereto, the courts can make none." *Stockton Theatres v. Palermo* (1956), 47 C.2d 469, 476.

Further, the purpose of 526(b) does not require the construction contended for by plaintiffs. The statute is intended to shield the City from the cost and burden of plaintiffs' mistakes and errors in prosecuting an action against it, and it makes no difference whether the action is defective on substantive or procedural grounds, whether it fails on the merits or for want of jurisdiction. The responsibility for bringing the action in the right court is upon the plaintiffs. There are a host of reasons why an action may fail, independent of its "merits." There is standing to sue, jurisdiction of the Court, statute of limitations, omission or misjoinder of parties, another action pending, res judicata, to name only a few. If an action is within 526(b) and fails for any of these reasons, the City is entitled to recover under the statute. Other-

wise, the City would be required to try the action against it on the merits, ignoring all other defenses it may have to defeat the action, in order to be made whole under C.C.P. 526(b).

If plaintiffs brought this action in the wrong forum it is perfectly reasonable that they should reimburse the City for the items of expense unnecessarily caused to it. This is so even if they subsequently bring the action in the State court and there be successful. C.C.P. 526(b) places the responsibility of their error in judgment upon them in this regard.

Plaintiffs' arguments on this point must fail for another reason. Contrary to what is said of their Answering Brief, the District Court did not decide that the plaintiffs' action could be maintained in the California courts, or that it was simply a question of the wrong forum. The parties did not argue whether the action would lie in the State court nor the District Court take it upon itself to decide that. It held only that the action was not maintainable in the United States District Court, Judge Halbert's Opinion closing with the observation that the place for the plaintiffs to seek their remedy, if any they had, was in the State court, not the federal court. The legal principle upon which dismissal was based was that of collateral estoppel—a principle which is essentially res judicata, raised in a court other than that which rendered the judgment. This bar is present whether plaintiffs sue in the federal or the State courts. The judgment of the District Court respecting their action was as much "on the merits" as will ever issue from

any court in this litigation. No court will go any further. The language quoted by plaintiffs from *S.M.U.D. v. P.G.&E.,* 20 C.2d 684,[1] is no help to them. The District Court clearly dismissed their action because it had no legal foundation.

B. THE CITY DOES HAVE AN ACTION AGAINST PLAINTIFFS UNDER C.C.P. 526(b) UNDER THE FACTS OF THIS CASE.

1. Plaintiffs label their action as one for "declaratory judgment," and say that therefore, 526(b), which deals with injunctions, does not apply.

The section is applicable to

> "any suit to obtain an injunction . . . enjoining . . . the expenditure of the proceeds of the sale of such bonds or other securities. . . ."

As City already pointed out in its Opening Brief, plaintiffs expressly seek a judgment that the City's deposit of the bond proceeds, in the amount of $2,206,000 with the Clerk of the Superior Court, for payment to Citizens of California, is invalid. Plaintiffs pray for a decree that the deposit, still lodged with the Superior Court, would not constitute a valid payment when distributed to the condemnee (or the plaintiffs, who claim it in the condemnee's stead) under C.C.P. 1252. A determination that City's deposit will not serve as effective payment would compel

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[1] "The section establishes as a prerequisite to the recovery of those expenses that the private utility be unsuccessful, thus indicating that its action was without legal foundation." 20 C.2d, at 694.

its return to the City, and would so clearly and effectively enjoin the City's expenditure of the funds for the water system that an injunction forbidding the expenditure in express terms could do no more. Plaintiffs cannot ignore what is in substance and effect an action for injunction by the device of calling it an action for declaratory relief.

2. Plaintiffs also assert that 526(b) only creates a right of recovery if the action is instituted *before* the bonds or securities are sold or delivered. This too is untenable. The section clearly gives the City a right of recovery for unsuccessful actions instituted after the bonds are sold. The statute is applicable if the suit is to enjoin "the expenditure of the proceeds of such bonds," and this obviously assumes an instance where the bonds have been sold. Nor does the fact that the action does not prevent the City's actually taking over the system prevent the application of Section 526(b). If that were intended, it would have been simple enough for the Legislature to say so, and it did not. Instead, the Legislature has said that there is a right of recovery, if "the injunction sought is finally denied," thus making the denial of a permanent injunction the only condition to the City's right of recovery. It surely was apparent to those who drafted and adopted this language that a request for a preliminary injunction might either be granted *or denied* pending the litigation (in which case the City would acquire possession pending the action), but that makes no difference to the City's right of recovery. The language which plaintiffs quote from *S.M.U.D.*

v. P.G.&E. on page 10 of their Brief does not say anything contrary to this. The California Supreme Court referred to litigation which would hamper and interfere with the "development and operation" of a public utility by a public agency. This could include litigation instituted after the acquisition as well as before the acquisition.

3. Plaintiffs also misread the following language in *S.M.U.D. v. P.G.&E.,* to the effect that 526(b) applies:

> "only (to) private utilities and such of those as operate within the area embraced by the public agency." (20 Cal.2d, at 694.)

It does not apply, say the plaintiffs, to those in the business of lending money. The quoted language does not exclude those who are not engaged in the utility business being acquired by the City. Such a construction would make it so simple to avoid the consequences intended by the statute that it would become meaningless. The scope of the statute is clear. It applies to every person or corporation that "owns, controls, or is operating or interested in, a public utility business of the same nature as that" for which the bonds were sold. While Marine Midland may not be a utility itself, the pleadings and record in this action make it plain that it "controls" and is "interested in" public utility water systems. Its complaint alleges that it is a pledgee of all of the stock of Citizens of California (Tr. 3, par. 13) and that Citizens of California owns and operates a water public utility system in, outside and adjacent to the City of North Sacramento

(Tr. 3, par. 11). The pledge gives it control of and makes it legally interested in approximately sixteen other water systems in California which are owned by Citizens of California. (Tr. 78.) The Complaint further alleges that the parent corporation, Citizens Utilities Company of Delaware, is engaged in "the ownership and operation of various public utility systems in ten of the states of the United States" (Tr. 3, par. 9), and that the parent corporation executed in favor of the plaintiffs the Indenture of Mortgage and Deed of Trust to secure the issuance of its bonds (Tr. 3, pars. 12 and 13), which Indenture gave plaintiffs a security interest in the utility properties held by Citizens of Delaware.[2]

4. Plaintiffs' parting shot at the applicability of C.C.P. 526(b) is that it is a penalty statute and therefor must be strictly construed. Section 526(b) merely requires the plaintiff to reimburse the City for attorneys' fees and other expenses forced upon it by the plaintiffs' unsuccessful suit. Requiring such reimbursement for the institution of baseless legal action cannot be called a "penalty." It is not in any sense a punishment. It would be penalty if the state exacted some retribution from such a plaintiff, or made him liable for punitive or exemplary damages, but requiring him to pay the expenses occasioned to the defendant cannot be labeled a penalty.

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[2]The Indenture, by its terms, conveys to plaintiffs "all water systems for the supply of water" owned by Citizens of Delaware, including two water systems in Arizona, three in Idaho, and one in Washington. (Tr. 78.)

> "The test generally underlying most of the cases, however, is that a 'penalty' includes any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage done him by the former." *Miller v. Municipal Court* (1943), 22 C.2d 818, 837.

The decision in *Marshall v. Gote,* 81 C.A. 98, does not say an award of attorneys' fees is a penalty in the sense of exacting from the person responsible more than the damages caused by him. That decision cites *E. Clemens Horst Co. v. Industrial Acc. Comm.,* 184 Cal. 180, which held that an attorneys' fee award under the Workman's Compensation statute does not amount to punitive or exemplary damages, but is compensation in the strict sense for the injury caused. Plaintiffs cite no case and none exist which require that strict construction be given to a statute awarding attorneys' fees to a successful litigant.

POINT II

IN ANY EVENT, DENIAL OF "COSTS" TO DEFENDANT CITY WAS AN ABUSE OF DISCRETION.

Plaintiffs uphold the denial of costs by arguing that the City unduly prolonged the proceedings in moving for summary judgment, which was denied, and by then moving for dismissal, which was granted. The City deemed summary judgment necessary in order to clarify, by affidavits and admissions which are allowable under the summary judgment procedure, the exact rights of plaintiffs in the water system. What

they were and from whom they were derived could not be determined from reading paragraph 13 of the Complaint. Moreover, the City understood the law to be that

> "Whether the pleading be termed a motion to dismiss or for judgment by summary proceedings is of no great importance." *Glenn v. So. Calif. Edison Co.,* 187 F.2d 318, at 320,

and felt that Judge Halbert's denial of summary judgment upon the technical ground that it was the wrong type of motion[3] was not in accord with existing law.

Next the plaintiffs say in connection with City's motion to dismiss that:

> "The Court, not satisfied with the issues raised by the defendants, found it necessary to request 'further briefing' and to allude to specific points as to which it required clarification." (Brief, p. 14.)

The City's motion to dismiss was on the theory that plaintiffs' action was equivalent to a shareholder's suit and that their Complaint had to comply with Rule 23(b) in order for them to sue. Plaintiffs opposing memorandum cited no cases in opposition to this argument, whereas the Court, upon researching the point, found *seven* cases dealing with the pledgee's right to sue. (Tr. 44.) Accordingly, it asked for briefing on those cases, together with subsidiary ques-

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[3]"The Court is of the view that the status of plaintiffs in this action cannot be reached in this proceeding. The decision here made on the motion for summary judgment does not in any way prejudice defendants as to the making of any other appropriate motion." (Tr. 40.)

tions they raised. Failure to cite and discuss those cases was an omission of plaintiffs, not defendant City, because the Court's impression of them was that they gave a pledgee an action of a non-derivative nature.

Plaintiffs' concluding statement under this point, viz:

> "Plainly, the District Court was of the opinion that Plaintiffs herein 'had good reason to think the defendant was liable upon equitable principles.' Bliss v. Anaconda Mining Co., Supra." (Brief, p. 15.)

would not follow from the foregoing points, even if they were true. Judge Halbert gave no indication on these matters, either to the parties, on or outside of the Record. Had this been in the mind of the Judge, he would have said so in denying City's motion for costs, but he did not. (Tr. 81a.)

Both the case cited by the plaintiffs (*Bliss v. Anaconda Copper Mining Co.*, 167 F. 1024) and the case cited by the defendant City (*Chicago Sugar Co. v. American Sugar Co.*, 176 F.2d 1) agree that the Court has the power to deny costs to a successful defendant if the plaintiff brought the action in good faith, and it involved issues as to which the law was in doubt, or not thoroughly settled. But in this case Judge Halbert refrained from making any expression regarding the good faith of the plaintiffs,[4] and nowhere does

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[4]In fact, he noted the seemingly endless attacks on the condemnation judgment persisted in by Citizens of California in the State Courts. (Tr. 5.)

his Opinion suggest that the questions involved are not well settled or that the applicable law was in doubt. Such exceptions as there are do not apply here.

> "The prevailing party is, however, prima facie entitled to costs, and it is incumbent on the unsuccessful party to show circumstances sufficient to overcome the presumption." *In Re Northern Indiana Oil Co.* (7th Cir., 1951), 192 F.2d 139, 142.

Plaintiffs have not shown exceptional circumstances. They made no attempt to show any when the City moved to amend the judgment re costs, filing nothing in opposition thereto. Judge Halbert referred to none, either in his Memorandum granting the motion to dismiss (Tr. 47-54) or in his Order denying the motion to amend the judgment re costs. (Tr. 81a.) None are in fact present.

The denial of costs in this instance must be additionally considered in the light of C.C.P. 526b, a state statute giving the City an absolute right of recovery of its costs. There was no reason for the District Court to refuse the City the benefit of its provisions. *Sioux County v. National Surety Co.* (1928), 276 U.S. 238, at 243, 72 L.ed. 547; *Cohen v. Beneficial Industrial Loan Corp.* (1948), 337 U.S. 541, 93 L.ed. 1528.

CONCLUSION

The District Court should be directed to amend the Judgment of April 26, 1963, to tax costs upon plaintiffs, and to permit defendant City to file its counterclaim against plaintiffs under C.C.P. 526b.

Dated, February 7, 1964.

Respectfully submitted,

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